A

AZMI OSMAN

v.

PP

B

HIGH COURT MALAYA, JOHOR BAHRU
SAMSUDIN HASSAN JC
[CRIMINAL APPEAL NO: 42S-06-2012]
13 MARCH 2013

C ***CRIMINAL LAW:*** *Anti-Corruption Act 1997 - Section 19(1) - Making of statement which is false or intended to mislead - Notice under s. 32 - Declaration made by appellant - Whether there were discrepancies - Failure to state full and frank disclosure - Whether proven - Statement made to officer of Anti Corruption Agency during investigation - Failure* D *of witness to attend court - Whether statement admissible under s. 46*

CRIMINAL LAW: *Penal Code - Section 200 - Using as true any such declaration known to be false - Submission of declaration as supporting document in reply to notice under s. 32 Anti-Corruption Act 1997 - Failure to state full and frank disclosure in notice - Whether irregularities* E *existed*

EVIDENCE: *Witness - Absent witness - Statement made to officer of Anti Corruption Agency during investigation - Failure of witness to attend court - Whether statement admissible under s. 46 Anti-Corruption* F *Act 1997 - Principle of generalia specialibus non derogant - Whether s. 46 overrode s. 32 Evidence Act 1950*

The appellant, a government servant, was charged in the Sessions Court under s. 19(1) of the Anti-Corruption Act 1997 ('the Act') G and s. 200 of the Penal Code and was convicted and sentenced to one year and six months' imprisonment, respectively. On 6 September 2005, the appellant was served with a notice under s. 32(1)(a) of the Act. In response to the notice, the appellant submitted, *inter alia*, the following documents, *ie*, (i) "senarai harta H yang dipunyai dan masih dalam tanggungan hutang Azmi bin Osman" ('P1(A-E)'); and (ii) "surat akuan Jethalal s/o Dhirajlal Shah" ('P3'). P26 was a statement made by Jethalal Shah during investigation. However, the said Jethalal Shah failed to attend court proceedings despite attempts taken to secure his attendance. I It was alleged that there were discrepancies in the declaration

made by the appellant. The prosecution submitted that there were undisclosed and false declarations in relation to: (a) the appellant's insurance policy; (b) the failure to declare that a sum of RM500,000 was withdrawn from the appellant's bank account; and (c) the fact that the sum used to purchase the fixed deposit was obtained from Jethalal Shah. Dissatisfied with the decision of the trial court, the appellant appealed to this court against both the conviction and sentence imposed upon him. Among the issues that arose for consideration were (i) whether P26 was wrongly admitted by the trial judge; and (ii) whether the sentence passed upon the appellant was excessive.

Held (dismissing appeal; affirming decision of Sessions Court):

(1) The notice under s. 32 of the Act was issued by the Public Prosecutor when there is reason to believe that an offence under the Act had been committed based on the investigation conducted by the Anti Corruption Agency ('the agency'). The notice offered an opportunity to the appellant to give a full and frank disclosure of his assets. It was incumbent upon the appellant to identify every property which was owned by him or in his possession, which he holds any interest in and the manner it was acquired. Further, the appellant must declare whether the property had been transferred or sold as it would/might form part of his sources of income, earnings and assets. The appellant had to respond to the notice by making a declaration on oath. (paras 7, 26-28 & 30)

(2) There were irregularities containing undisclosed and false declarations. These contradiction was material and it was confirmed by the prosecution witnesses and documents pointed out during trial. The evidence from the witnesses had melted the truthfulness of the appellant's declaration. The issue regarding the purchase of insurance policies from 2000 until 2001, surrendering of the said policies and payment made to the appellant was never transpired in the appellant's declaration. (paras 29 & 31)

(3) The appellant failed to declare that the sum of RM500,000 was withdrawn *via* the cheque signed by him. The appellant falsely declared that the payment for all ten fixed deposits amounting to RM500,000 involving ten different cheques

worth RM50,000 each came from Jethalal Shah. Evidence revealed that the money came from the appellant's bank account. The appellant did not provide a proper explanation in order to raise a doubt on the prosecution's case. (paras 25, 32, 33 & 36)

(4) Jethalal Shah, a Singaporean, failed to attend the court proceedings despite attempts taken to persuade him to come to Malaysia to give evidence. Reference was made to s. 22(1)(a) and (9) of the Act in relation to the law on admissibility of statement made by an absent witness. Further, s. 46 of the Act provides that notwithstanding any written law to the contrary, any statement made by a person to an officer of the agency in the course of an investigation shall be admissible. The principle of *generalia specialibus non derogant* shall be applicable. Thus, the application of s. 46 overtook s. 32 of the Evidence Act 1950 since the change involving the appellant was on a specific statute which had a similar provision as s. 32. As such, P26 was rightly admitted by the trial judge. (paras 40 & 42-45)

(5) In relation to the charge under s. 200 of the Penal Code, P3 and P3(A) were the documents submitted together with P1(A-E). The contents of these two documents were compared with the evidence of the prosecution witnesses. Upon perusing the said witnesses' evidence and P26, there were irregularities in comparing with P1(A-E). (para 48)

(6) The sentence passed by the trial judge was not excessive in order for it to be disturbed. The trial judge had rightfully evaluated all the mitigating and aggravating factors. (para 53)

Case(s) referred to:
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 19(1), 22(1)(a), (9), 32(1)(a), 46
Evidence Act 1950, s. 32
Penal Code, s. 200

For the appellant - Adam Yap Boon Han (SN Sritharan with him); M/s Nor Affiza & Co
For the respondent - Abdul Ghafar Abdul Latif; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Samsudin Hassan JC:

Introduction

[1] The appellant in this case was charged under s. 19(1) of the Anti-Corruption Act 1997 and s. 200 of the Penal Code and at the end of the whole case he was convicted and sentenced to one year and also six months imprisonment respectively from 26 January 2012. Later the appellant appealed against both conviction and sentence to High Court.

The Charge

[2] The two charges against the appellant were as follows:

First Charge (Case No: 61-4-2008)

> Bahawa kamu di antara 29 September 2005 dan 10 Oktober 2005 di No. 9, Jalan Padi Ria 13, Bandar Baru Uda, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah membuat suatu pernyataan iaitu Surat Akuan Bersumpah bertarikh 8 Oktober 2005 beserta Senarai Harta Alih dan Tidak Alih bertarikh 29 September 2005, yang diketahui oleh kamu adalah palsu kepada Pendakwa Raya semasa beliau menjalankan kuasa yang diberikan di bawah seksyen 32(1) Akta Pencegahan Rasuah 1997 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 19(1) Akta yang sama.

Second Charge (Case No: 61-5-2008)

> Bahawa kamu di antara 29 September 2005 dan 10 Oktober 2005 di Ibu Pejabat Badan Pencegah Rasuah, Blok D6, Putrajaya di dalam Wilayah Persekutuan Putrajaya secara tidak jujur telah menggunakan sebagai benar suatu akuan iaitu Surat Akuan Bersumpah oleh Jethalal Shah s/o Dhirajlal Shah (No. Pasport Singapura: S1468449B) bertarikh 12 Ogos 2005, yang diketahui oleh kamu adalah palsu tentang mana-mana perkara mustahak di dalamnya dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 200 Kanun Keseksaan yang boleh dihukum di bawah seksyen 193 Kanun yang sama.

The Ground Of Appeal

[3] Counsel for the appellant has raised several grounds of appeal against the conviction and sentence imposed by the Sessions Court. The primary issues included in the appellant's ground of appeal are as follows (in Bahasa Malaysia):

(i) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana telah gagal mengambilkira bahawa pertuduhan di bawah seksyen 19(1) APR (kes no. 61-4-2008) adalah defektif di mana pertuduhan tersebut tidak menyatakan secara spesifik butiran mana yang dikatakan adalah palsu dalam Surat Akuan (P11) dan/atau Senarai Harta Alih dan Tidak Alih P1(A-E) Perayu dan ini telah menyebabkan Perayu adalah diprejudiskan kerana tidak mempunyai notis secukupnya untuk tahu apakah "kepalsuan" yang dimaksudkan dalam pertuduhannya dan kesilapan ini adalah "material" dan menyebabkan satu kegagalan keadilan ("failure of justice").

(ii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila memutuskan kandungan dalam P1(A-E) adalah palsu dengan merujuk kepada percakapan dalam pemeriksaan Jethalal Shah (P26) yang seharusnya tidak boleh diterima masuk atas dasar "dengar cakap" ("hearsay") dan ketidakhadiran Jethalal Shah yakni tidak memenuhi keperluan dalam seksyen 46 APR.

(iii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana gagal mempertimbangkan dan tidak memberi penjelasan dan/atau alasan bagi penerimaan masuk P26 yang bersifat "prejudis" dan dengar cakap.

(iv) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana gagal mengambil kira bahawa kandungan P26 mempunyai banyak percanggahan, penuh dengan kesangsian dan bersifat prejudis yang mana Perayu tidak dapat mencabar kredibiliti serta kebenaran kandungannya.

(v) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana walaupun sekiranya P26 diterima masuk sebagai eksibit, kandungan dalam P26 tidak seharusnya diberi apa-apa keberatan atas dasar, sifat dan cara P26 diambil dan diterima serta Jethalal Shah ialah saksi berkepentingan dan seorang rakan sejenayah.

(vi) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana tidak memberi pertimbangan atau amaran berkenaan penerimaan keterangan Jethalal Shah dalam P26 tanpa disokong oleh keterangan lain yang bebas.

(vii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila memutuskan "cara bayaran" dalam P1(A-E) adalah palsu tanpa mengambil kira ianya bermaksud "sumber atau punca pembayaran" sepertimana yang dalam keterangan dokumentasi yang lain.

(viii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang dalam memutuskan kandungan dalam kelima-lima senarai harta Perayu P1 (A-E) adalah palsu padahal keseluruhan keterangan dalam kes tidak menunjukkan keadaan yang sebenarnya.

(ix) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana memutuskan Perayu mempunyai pengetahuan bahawa kandungan dalam P1(A-E) dan Surat Akuan (P11) adalah palsu tanpa mengambil kira keterangan yang lain serta urutan kejadian ("sequence of events").

(x) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana gagal mengambil kira bahawa notis di bawah seksyen 32(1) APR ("Notis") adalah tidak sah ("invalid" and "bad in law") dan tidak munasabah dari segi dasar Notis ini dikeluarkan serta tiada penjelasan dan format yang tertentu untuk dipatuhi berdasarkan keterangan-keterangan serta kegagalan pihak pendakwaan memanggil saksi lain yang material.

(xi) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana tiada keterangan yang menunjukkan Perayu tahu atau mempunyai niat untuk membuat Surat Akuan (P11) dan Senarai Harta Alih dan Tidak Alih (P1(A-E)) secara palsu.

(xii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila gagal mempertimbangkan bahawa selain daripada P26 (yang tidak boleh diterima masuk) tiada keterangan bebas lain yang membuktikan Surat Akuan Bersumpah Jethalal Shah (P3) adalah palsu sedangkan ianya dibuat olehnya (Jethalal) secara sukarela dan ini disokong oleh keterangan saksi pendakwaan dan pembelaan.

A

(xiii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila berpandukan kepada keterangan pegawai penyiasat SP10 yang penuh dengan kesangsian, keterangan dengar cakap serta bercanggah dengan keterangan saksi serta keterangan dokumentasi.

B

(xiv) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mempertimbangkan penerimaan P3 dari segi cara dan format pembentukkan surat akuan tersebut menurut undang-undang.

C

(xv) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila gagal mempertimbangkan pihak pendakwaan telah gagal untuk memanggil saksi-saksi material dan ini telah mewujudkan satu kekosongan ("gap") dan penyembunyian keterangan yang penting ("suppression of material evidence") dalam kes pendakwaan.

D

(xvi) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila tiada keterangan menunjukkan Perayu mempunyai niat atau alasan untuk menggunakan P3 secara tidak jujur berdasarkan urutan kejadian dan keterangan yang lain.

E

(xvii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila gagal mempertimbangkan bahawa beban pembuktian adalah sentiasa pada pendakwaan dan seharusnya tiada kes "*prima facie*" dibuktikan bagi kedua-dua kes terhadap perayu.

F

(xviii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila memutuskan pembelaan adalah satu penafian semata-mata padahal keterangan perayu adalah satu penjelasan yang disokong oleh saksi pembelaan, eksibit pembelaan serta keterangan saksi pendakwaan dan eksibit pendakwaan.

G

(xix) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila menyatakan pembelaan perayu adalah satu penjelasan yang tidak jujur kerana eksibit D93 dan D94 tidak mempunyai kesan undang-undang dan tidak relevan, pada hal keterangan lain menunjukkan sebaliknya.

H

I

(xx) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang kerana gagal menilai keterangan pembelaan secara menyeluruh dan membuat kesimpulan yang tidak tepat terhadap pembelaan perayu.

(xxi) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila memutuskan pembelaan perayu bersifat "afterthought" padahal perayu menunjukkan soalan-soalan yang berdasarkan pembelaan kepada saksi pendakwaan dan bukannya satu "belated disclosure".

(xxii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila memutuskan Tan Hock Soon dan Yenny Susanti telah gagal dipanggil oleh pembelaan padahal kedua saksi ini adalah saksi pendakwaan dan beban adalah sentiasa pada pendakwaan untuk memanggil mereka. Tambahan pula, pihak pembelaan juga telah mengambil usaha yang untuk memanggilnya dan kewujudannya tidak dicabar atau dipertikaikan oleh pihak pendakwaan.

(xxiii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila menyatakan Yenny Susanti adalah rekaan dan tidak wujud padahal keterangan saksi pendakwaan tidak mempertikaikan kewujudan dan keterangan saksi pembelaan juga menyokong tentang kewujudannya.

(xxiv) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila gagal mempertimbangkan bahawa saksi-saksi pembelaan adalah saksi yang tiada kepentingan ("disinterested witness") yang mana nilai serta keberatan keterangan mereka harus diberi pertimbangan yang sewajarnya.

(xxv) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang bahawa pihak pendakwaan gagal mencabar dan atau memanggil apa-apa "evidence in rebuttal" terhadap keterangan pembelaan.

(xxvi) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila membuat penemuan fakta yang salah ("wrong finding of facts") dan gagal untuk menilai pembelaan dan mempertimbangkan segala aspek keterangan yang memihak pembelaan dan kegagalan berbuat demikian adalah salah satu arah dan ketidakadilan ("misdirection and miscarriage of justice").

A (xxvii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila gagal mempertimbangkan bahawa pembelaan Perayu adalah konsisten, disokong, tidak tercabar serta merupakan satu penjelasan yang munasabah.

B (xxviii) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila memutuskan perayu telah gagal untuk menimbulkan satu keraguan yang munasabah diakhir kes pembelaan sedangkan keterangan menunjukkan sebaliknya.

C (xxix) Tuan Hakim Mahkamah Sesyen telah tersilap dan terkhilaf dari segi fakta dan undang-undang apabila hukuman yang dijatuhkan ke atas kedua-dua pertuduhan adalah "manifestly excessive" tanpa mengambil kira faktor-faktor mitigasi serta fakta kes.

D **[4]** Respondent in the written submission has answered all the above mentioned grounds of the petition of appeal based on the arrangement below:

E (i) Item 1 until 6 and item 15 in the petition of appeal refer to as first issue.

(ii) Item 7 and 8 in the petition of appeal refer to as second issue.

F (iii) Item 9, 10 and 11 in the petition of appeal refer to as third issue.

(iv) Item 12 and 14 in the petition of appeal refer to as fourth issue.

G (v) Item 13 in the petition of appeal refer to as fifth issue.

(vi) Item 17 in the petition of appeal refer to as sixth issue.

(vii) Item 16 and item 18 until 28 refer to as seventh issue.

H (viii) Item 29 in the petition of appeal refer to as eighth issue.

[5] Whereas the judgment of this court on all issues raised by the appellant will first dealt with the charge in respect of Case No. 61-4-2008 ('first charge') and follow by the second charge I with Case No. 61-5-2008.

First Charge (Case No: 61-4-2008)

[6] On 6 September 2005 the appellant was served with a notice under s. 32(1)(a) of the ACA 1997. The notice was served by SP7 to the appellant personally. Such notice here in after shall be referred to as "the notice".

The Notice Served To The Appellant

[7] The notice under s. 32 of ACA 1997 was issued in writing by Deputy Public Prosecutor Kamal Baharin bin Omar on behalf of the Public Prosecutor. The notice was issued by the Public Prosecutor when there is reason to believe that an offence under the Anti-Corruption Act 1997 has been committed based on the investigation conducted by the Anti-Corruption Agency ("the agency").

[8] Upon receiving the notice, it is the duty of the appellant to identify every property which owned by him or in his possession, or which he has any interest in it. The appellant must also specify the date on which the properties was acquired, the manner it was acquired, its value and location.

[9] The appellant must also identify the person who is currently in possession of the properties. As to whether it is still held by the appellant or any other person, transferred or sold regardless whether the property is still kept by the appellant, diminished in value or commingled with other property.

[10] The appellant must set out all the information relating to his properties, business, travel and others as specified in the notice.

[11] Apart from that appellant must also provide his sources of income, earnings and assets.

[12] The appellant was also required to provide information relating to his property sent out of Malaysia by him from 15 January 1998 until 31 December 2005.

[13] The notice has its implication under the law. The notice shall bound the appellant to state the truth and full disclosure on what was requested in the notice which is within his knowledge, or which is available to him, or which is capable of being obtained by him.

A **The Appellant Responds On The Notice**

[14] The notice was served to the appellant on 6 September 2005. The appellant was given 30 days to provide such declaration to the Deputy Public Prosecutor Kamal Baharin bin Omar.

B

[15] On 4 October 2005, the appellant personally handed an envelope to "Bahagian Perundangan dan Pendakwaan BPR" at Putrajaya. The envelope contained:

(i) Covering letter by the appellant marked as P10;

C

(ii) "Senarai harta yang dipunyai dan masih dalam tanggungan hutang Azmi bin Osman" marked as P1(A-E);

(iii) "Surat akuan Jethalal s/o Dhirajlal Shah" marked as P3;

D (iv) "Senarai harta yang dipunyai dan masih dalam tanggungan hutang Maznah bte Md Yatim" marked as P6(A-B);

(v) "Surat Akuan Maznah bte Md Yatim Shah" marked as P7.

E **Discrepencies In The Declaration Made By The Appellant**

[16] In reply to the notice served to the appellant, he provided the agency with "senarai harta yang dipunyai dan masih dalam tanggungan hutang Azmi bin Osman" marked as P1(A-E). P1(A-E) is one of the documents sent by the appellant in reply to the

F notice served.

[17] In the submission by counsel for the appellant, the court's attention was brought on the involvement of one "Mr Shah" (later known as Jethalal s/o Dhirajlal Shah) at column "cara bayaran" on

G fixed deposit, unit trust and shares in P1(A-E). By referring further to P1(A-E), item 11 until 24 and item 35 until 57, these properties were allegedly obtained by the appellant from Mr Shah.

[18] These facts are relevant as the appellant must specify the

H manner in which it was acquired.

Item 35, 37, 41 Until 44, 46, 47 And 49 Until 56 In The Declaration

[19] Under this paragraph, the evidence of PW11 and PW24 was compared with P1(A-E). According to PW11, the appellant was a

I known customer to her as he had been purchasing insurance policies from year 2000 until 2001. PW11 said that the appellant bought 16 insurance policies. These insurance policies was later produced in court as evidence which bears the appellant's name.

[20] PW24 is the superior officer of PW11. According to PW24, the appellant did made an application to surrender the said policies. When the policies was surrendered, payment for the 16 insurance policies was made to the appellant and not to Mr Shah. These policies are stated in item 35, 37, 41 until 44, 46, 47 and 49 until 56 in P1(A-E). The appellant has failed to reflect this fact in his declaration.

Item 12 In The Declaration

[21] Item 12 refers to a Maybank account owned by the appellant which was declared as a fixed deposit account. According to PW20, the appellant owned a Maybank account under the account number 501011803326. This account number reflected to item 12 of the declaration.

[22] Undisclosed by the appellant was that a sum of money amounting to RM500,000 had been withdrawn by the appellant leaving the balance of RM100,000. The cheque for withdrawal was signed by the appellant.

[23] This fact shows that the money belongs to the appellant, it is not valued at RM100,000 as per in P1(A-E) and it was never disclosed in P1(A-E) that RM500,000 had been withdrawn by the appellant *via* cheque from the account as required under the law.

Item 11, 15 Until 23 In The Declaration

[24] Item 11, 15 until 23 are referring to fixed deposit account owned by the appellant. According to the declaration, the money used to purchase the fixed deposit was obtained from Mr Shah.

[25] Upon perusing the evidence of Amran bin Awg Mat Nor; the assistant manager for Maybank Mentakab (PW22), the payment of all ten fixed deposit for item 11, 15 until 23 amounting to RM500,000 was made using ten different cheque each worth RM50,000. The cheque was issued by Malayan Banking Berhad branch in Mentakab Pahang and Johor Bahru. Evidence also revealed that the appellant own such account in Malayan Banking Berhad in Mentakab Pahang account number 006025313564 and Johor Bahru branch account number 501011-803326. It signals that the money comes from the appellant account from Malayan Banking Berhad branch in Mentakab Pahang and Johor Bahru branch and not by Mr Shah as declared by the appellant in P1(A-E).

A **Application On The Evidence Presented And The Law Under S. 32(3) ACA 1997**

[26] The appellant in this case was instructed to make declaration as required under s. 32 of the Anti-Corruption Act 1997. The
B appellant responds to the notice by making a declaration on oath.

[27] The notice under s. 32 of the ACA 1997 makes it incumbent upon the appellant to identify every property which owned by him or in his possession, which he holds any interest in and the manner it was acquired.
C

[28] Furthermore, the appellant must declare whether the property has been transferred or sold as it would/might form part of his sources of income, earnings and assets.

D **[29]** The evidence presented during trial pointed out few irregularities which contain undisclosed and false declarations. This contradiction was material and it was confirmed by few prosecution witnesses and documents pointed out during trial. The evidence given by PW11, PW20, PW22 and PW24 has melted
E the truthfulness of appellant's declaration.

[30] P1 is a declaration prepared by the appellant and it was made on oath. The notice offers the appellant the opportunity to give a full and frank disclosure of his assets. Thus, the issue of knowledge has been proven since it was made by the appellant
F himself. The declaration shall then be deemed to be correct as a whole upon oath by the appellant on its content. The appellant must provide the court with a satisfactory explanation.

[31] The evidence given by PW11 and PW24 regarding the
G purchase of insurance policies from year 2000 until 2001, surrendering of the said policies and payment made to the appellant was never transpired in the appellant's declaration. The appellant also fail to cross examine PW11 and PW24 on the crucial fact of contradiction in item 35, 37, 41 until 44, 46, 47
H and 49 until 56 that the appellant had requested that the policies has been surrendered to the appellant upon appellant's request.

[32] In item 12, the appellant has also fail to declare that a sum of money amounting to RM500,000 withdrawn *via* cheque sign by
I the appellant. Thus, item 12 in P1(A-E) is not valued at RM100,000 and the RM500,000 was never disclosed in P1(A-E) as required under the law.

[33] The appellant also has falsely declare that the payment of all ten fixed deposit for item 11, 15 until 23 amounting to RM500,000 involving ten different cheque worth RM50,000 each. He had alleged that the money comes from Mr Shah. Yet, evidence reveal that the cheque was issued by Malayan Banking Berhad branch in Mentakab Pahang and Johor Bahru owned by the appellant's account number 006025313564 and 501011-803326.

[34] During trial, the appellant had claimed that Jethalal Shah s/o Dhirajlal or also known as "Mr Shah" as the person who should be called by the respondent to provide the explanation. Failure to do so would render an imposition of adverse inference to be applied upon the respondent. The appellant claimed that if Mr Shah were called by the respondent it would make their defence solid.

[35] In evaluating the analogy laid down by the appellant, this court will refer back to the duty of the respondent (prosecution) and the defence in a criminal trial. In order to bring back the charge, the respondent need to prove the narrative and called relevant witnesses to the stand. As for the appellant, their duty is to raise doubt to the respondent's case. It directly means it is not the duty of the respondent to call up all witnesses which statement has been recorded during investigation. The respondent is only bound to call up witnesses to prove the narratives of their case. This happens especially when the law provides that no number of witnesses is required to prove a fact. Since adverse inference cannot be drawn against the appellant, they are at the liberty to call up Jethalal Shah s/o Dhirajlal if he is necessary to the defence case. In the case of *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 at p. 287, Justice Augustine held that:

> If ASP Zull Aznam is in a position to provide an explanation for the meeting which is contrary to the assertion of Azizan, then it is for the defence to call him as its witness, if necessary, bearing in mind the fact that it is not the duty of the prosecution to prove the case for the defence. I was therefore of the view that ASP Zull Aznam was not a material witness necessary to unfold the case for the prosecution.

[36] The evidence presented by the appellant during the defence case does not provide the court with a proper explanation in order to raise doubt upon the prosecution case. The evidence presented by the defence is merely a denial and it does not

provide an explanation within his knowledge, or which is available to him, or which is capable of being obtained by him regarding his property that would break the prosecution evidence.

[37] In conclusion, this court found that, the defence has failed to raise a reasonable doubt to the evidence presented by the prosecution.

Admissibility Of Statement Made By Jethalal Shah Dhirajlal Shah As P26

[38] Counsel for the appellant has submitted that exh. P26 was wrongly admitted by the learned Sessions Court Judge thus has erred him in reaching his conclusion at the end of defence case.

[39] This court has heard the argument by both parties on this matter, and hereby provide its finding on this issue.

[40] P26 is a statement made by a witness in investigation named; Jethalal Shah s/o Dhirajlal. He was contacted with the assistance of Corrupt Practices Investigation Bureau ("CPIB") in Singapore since Jethalal Shah s/o Dhirajlal is a Singaporean who resides in Singapore. Jethalal Shah s/o Dhirajlal Shah failed to attend court proceeding despite attempts taken by BPR and CPIB to persuade him to come to Malaysia to give evidence.

[41] In determining the law on admissibility of statement made by absent witness, this court refer to s. 22(1)(a) and (9) of the ACA 1997. It stated that statement of an examination under s. 22(1)(a) shall be admissible in evidence in any proceedings in any court, notwithstanding any written law or rule of law to the contrary for an offence under this Act regardless whether such proceedings are against any other person.

[42] Furthermore, s. 46 of the ACA 1997 also provides that notwithstanding any written law to the contrary, any statement made by any person to an officer of the agency in the course of an investigation shall be admissible in evidence in any proceedings against any person where the person who made the statement whose attendance cannot be procured without an amount of delay or expense which appears to the court unreasonable.

[43] The application of s. 46 of the ACA 1997 overtakes s. 32 of the Evidence Act 1950. The principle of *generalia special bus non derogant* shall be applicable as the change involving the appellant is on a specific statute which has similar provision as s. 32 of the Evidence Act 1950.

[44] In this case, Jethalal Shah s/o Dhirajlal is a Singaporean who lives in Singapore. Attempt has been made by ACA and CPIB to locate and persuade him to give evidence in court yet such attempt was left in vain (exhs. P23 and P24). Any delay in hearing this case is unreasonable to the appellant and the respondent especially when the appellant in this case is a government servant.

[45] From these provisions alone, it can safely be concluded that as on the matter of admissibility, exh. P26 was rightly admitted by the trial judge. The fact that this evidence was admitted does not necessarily mean that it would carry much weight to the prosecution case. This court will look at the totality of the evidence presented by witnesses and exhibit referred during trial.

[46] Upon perusing all the evidence presented, this court is of the view that the appeal on conviction on the first charge is dismissed.

Second Charge (Case No: 61-5-2008)

[47] The appellant in this case submitted P1(A-E) together with few documents in support to his declaration. The relevant documents presented by the appellant in the second charge are exhs. P3 and P3(A). These two documents were also mentioned in the covering letter prepared by the appellant and submitted by the appellant personally.

[48] The content of these two documents was compared with the evidence of PW11, PW20, PW22 and PW24. This court has perused the evidence presented by these witnesses and exh. P26 thus has concluded that there are irregularity in comparing with P1(A-E).

[49] As such, since the P3 and P3(a) was made as supporting documents for the appellant's declaration to the respondent it will swing together with exh. P1(A-E). This court hereby disallowed the appeal made by the appellant on conviction on the second charge.

[50] All the above mentioned issues relating to the two charges under s. 19 of the Anti-Corruption Act 1997 and s. 200 of the Penal Code has been thoroughly dealt with in the written submission prepared and filed by the respondent.

[51] This court therefore fully concurs and adopts the submission and clarification by the respondent on those disputed issues raised by the appellant in the petition of appeal and thus reaffirm the decision of the Sessions Court to convict the appellant on both the charges.

Appellant's Appeal On Sentence

[52] The counsel for the appellant seeks the court's indulgence to review the sentence passed by the trial judge as it was alleged to be excessive. The counsel in his mitigation during trial has urged the court to look at the appellant's background and responsibilities to his families. On aggravation, the respondent had earlier pray for a severe sentence by looking at the position of the appellant when the crime was committed and any sentence passed must adhere to the interest of the public.

[53] This court finds that the sentence passed by the trial judge does not in any way excessive in order for it to be disturbed. The trial judge has rightfully evaluate all the mitigation factors forwarded by the appellant and the aggravation factors by the respondent. As such the appellant's appeal on sentence for both charges is hereby dismissed.